In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-703

ROBERT PHILLIPS AND WILLIAM ARNOLD TOLBERT, JR., PETITIONERS

v.

UNITED STATES OF AMEICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury-waived trial in the United States District Court for the Southern District of Texas, petitioners were convicted of possessing 230 pounds of marijuana, a controlled substance, with intent to distribute (21 U.S.C. 841 (a)(1)). Petitioner Phillips was sentenced to five years' imprisonment and a special parole term of five years, and he was fined $5,000. Petitioner Tolbert was sentenced to 40 months' imprisonment and a special parole term of two years. The court of appeals affirmed (Pet. App. A).

The evidence adduced at trial showed that petitioner Phillips, accompanied by petitioner Tolbert, rented a car from Avis in Harlingen, Texas, on May 4, 1972, at which time both an ignition key and a trunk key were given to Phillips by the rental agent (Tr. 7). Petitioners had flown

together from Detroit to Texas (Tr. 64) and had spent the night at a local Ramada Inn (Tr. 60-61). The next day, while driving the car near Laredo, Texas, the two were stopped at a fixed Border Patrol checkpoint on Interstate Route 35, about 11 miles north of Laredo, at which border Patrol agents were conducting vehicular inspections for illegal aliens (Tr. 11). The agents informed petitioners of the purpose of the stop and asked Phillips, the driver, to open the car truck (Tr. 12-13) Phillips responded, "you are not going to believe this, but I don't have a trunk key" (Tr. 14).

The car was directed to a secondary area, where petitioners feigned looking for the trunk key, both telling the officers that the trunk key had not been issued by the car rental agency (Tr. 16, 50). In speaking with the Border Patrol agents, Phillips and Tolbert gave conflicting stories as to the purpose of their visit to Texas. Phillips stated, "We are both in pharmaceutical or banking business down here and we are just down to Laredo for an overnight trip" (Tr. 15). Tolbert, on the other hand, stated that he had been having family trouble and had come to Texas "to see what was going on" (Tr. 37). The officers tried unsuccessfully to obtain a trunk key from Avis (Tr. 36). They then removed the back seat of the car in order to gain access to the trunk compartment. They discovered therein packages of marijuana covered with mothball shavings to conceal the odor (Tr. 37-39).

1. Petitioners argue (Pet. 13-17) that marijuana was not a controlled substance under Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1242, 21 U.S.C. 801, *et seq.*, on the day they were found in possession of 230 pounds of it. The Act establishes five schedules of controlled substances and provides that the schedules "shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this sub-

chapter and shall be updated and republished on an annual basis thereafter" (21 U.S.C. 812(a)). The date of enactment was October 27, 1970, and the two-year period referred to in the Act thus commenced on October 27, 1971.

On May 8, 1972, the Director of the Bureau of Narcotics and Dangerous Drugs issued an order, published in the Federal Register on May 12, 1972, updating and republishing the schedules "as of April 27, 1972" (37 Fed. Reg. 9545). The date on which petitioners were found in possession of the marijuana was May 5, 1972. Their contention is that they committed no crime because "marijuana did not continue as a controlled substance beyond April 27" (Pet. 13). On their theory, there could be no prosecution for possession of *any* controlled substance from April 28 through May 11, 1972, because the initial schedules lapsed six months after the two-year period commenced.

There is no basis, however, for petitioners' narrow interpretation of the word "semiannual" to mean precisely every six months. The word also means "twice a year" (*Webster's Seventh New Collegiate Dictionary*, p. 787). The updating and republication in May 1972 substantially fulfilled the legislative purpose.

Moreover, the Act does not provide that timely updating of the schedules is a precondition to prosecution for an unlawful act with respect to a controlled substance, and there is no reason to believe that Congress intended the drastic consequences urged by petitioners. Although Congress contemplated semiannual and annual reviews of the substances included in the five schedules, it specifically provided that the initial schedules would continue in force

"unless and until amended pursuant to section 811 of this title" (21 U.S.C. 812(c)).[1] There has been no such amendment with respect to marijuana.[2]

2. Petitioner Phillips argues (Pet. 18-19) that the district court should have ordered the Internal Revenue Service to return to him $5,100 taken from him at the time of his arrest and later seized by the IRS under a jeopardy assessment. As this Court has stated, however, "[w]here * * * adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained" (*Phillips* v. *Commissioner*, 283 U.S. 589, 595). See 26 U.S.C. 6331, 6851, 6861. Petitioner's remedy is to file a civil action for

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[1]Petitioners suggest (Pet. 14) that the reference to Section 811 was intended to apply only to "permissive modification" of the schedules by the Attorney General and not to the mandatory updating provided for in Section 812(a). But any change in the schedules at the time of an updating would obviously be made pursuant to Section 811, which is the source of the Attorney General's authority to add or remove a drug from the schedules.

[2]Petitioners also argue (Pet. 15-18) that marijuana is not properly listed as a Schedule I controlled substance because neither Congress nor the Attorney General has made the findings required by the Act for Schedule I substances. The Act states that "a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance" (21 U.S.C. 812(b)). The provision obviously requires the specified findings only when a drug is to be added to a schedule or transferred from another schedule (see 21 U.S.C. 811(a)(1)(B)).

refund if he believes the money was illegally assessed or collected (26 U.S.C. 7422). Petitioner does not claim that the IRS jeopardy assessment affected the fairness of his trial.[3]

3. Petitioner Tolbert contends (Pet. 19-23) that the evidence was insufficient to show that he was in possession of the marijuana. The contention was thoroughly considered and properly rejected by the court of appeals (Pet. App. 3a-8a), on whose opinion we rely. The court recognized that "[p]roof of mere proximity to contraband is not sufficient to establish actual or constructive possession or the element of knowledge" (*id.* at 3a-4a). Proceeding, therefore, "with caution," the court "conclude[d] that there was sufficient evidence to support a finding of knowing possession by Tolbert" (*id.* at 4a). "[T]he car was locked, the suitcases were in the trunk, the quantity of contraband very large, a key had been delivered to Phillips but both defendants denied its existence, and there was an extensive pattern of conduct indicating a joint undertaking but with the two participants giving conflicting descriptions of it" (*id.* at 7a).[4]

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[3]Petitioner suggests that money seized at the time of arrest "may represent [a defendant's] only resource to obtain counsel and otherwise prepare his defense" (Pet. 19). We assume, however, that the suggestion is hypothetical in substance as well as form. Petitioner Phillips, who has been represented from the outset by retained counsel, stated at a bond hearing after his conviction that he owns his own home and several residential and commercial rental properties, including a 26-unit apartment building (Tr. 100).

[4]Petitioner Tolbert claims that the evidence was "equivocal on the question of guilt" (Pet. 21) and that the court of appeals in effect held that "evidence consistent with guilt would sustain a conviction even though it spoke with equal voice that the defendant was innocent" (Pet. 23). As the court's lengthy discussion demonstrates, however, the evidence of guilt was compelling, not equivocal, and the court did not state or imply that the evidence "spoke with equal voice that the defendant was innocent."

4. Petitioners argue (Pet. 9-13) that the pre-*Almeida-Sanchez* search of their vehicle for aliens at a Border Patrol checkpoint was unlawful and that the fruits of the search should have been suppressed. The court of appeals rejected the contention on the ground that the principles of *Almeida-Sanchez* do not apply retroactively (Pet. App. 2a-3a, and n. 3). The questions whether checkpoint searches of vehicles for aliens are lawful and, if they are not, whether evidence seized in such searches prior to the decision in *Almeida-Sanchez* must be excluded at trial are before this Court in *United States* v. *Ortiz*, No. 73-2050, and *Bowen* v. *United States*, No. 73-6848, argued February 18, 1975. With respect to the similar issue in this case, we believe it would be appropriate to defer action on the present petition for a writ of certiorari pending the decisions in *Ortiz* and *Bowen*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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